

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ELTON ANDERSON, ) NO. CV 07-00708 SS  
Plaintiff, )  
v. ) **MEMORANDUM DECISION AND ORDER**  
MICHAEL J. ASTRUE, )  
Commissioner of the Social )  
Security Administration, )  
Defendant. )  
\_\_\_\_\_  
)

**INTRODUCTION**

Elton Anderson ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying his application for Supplemental Security Income ("SSI") benefits. Alternatively, he asks for a remand. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED for further proceedings.

## **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

To qualify for disability benefits, a claimant must demonstrate a medically determinable physical or mental impairment that prevents him from engaging in substantial gainful activity<sup>1</sup> and that is expected to result in death or to last for a continuous period of at least twelve months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work he previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

To decide if a claimant is entitled to benefits, an ALJ conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

- (1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.
  - (2) Is the claimant's impairment severe? If not, the claimant is found not disabled. If so, proceed to step three.
  - (3) Does the claimant's impairment meet or equal one of list of specific impairments described in 20 C.F.R. Part 404,

<sup>1</sup> Substantial gainful activity means work that involves doing significant and productive physical or mental duties and is done for pay or profit. 20 C.F.R. §§ 404.1510, 416.910.

1                   Subpart P, Appendix 1? If so, the claimant is found  
2                   disabled. If not, proceed to step four.

3                   (4) Is the claimant capable of performing his past work? If  
4                   so, the claimant is found not disabled. If not, proceed  
5                   to step five.

6                   (5) Is the claimant able to do any other work? If not, the  
7                   claimant is found disabled. If so, the claimant is  
8                   found not disabled.

9  
10                  Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d  
11                  949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. §§  
12                  404.1520(b)-(g)(1) & 416.920(b)-(g)(1).

13  
14                  The claimant has the burden of proof at steps one through four, and  
15                  the Commissioner has the burden of proof at step five. Bustamante, 262  
16                  F.3d at 953-54. If, at step four, the claimant meets his burden of  
17                  establishing an inability to perform past work, the Commissioner must  
18                  show that the claimant can perform some other work that exists in  
19                  "significant numbers" in the national economy, taking into account the  
20                  claimant's residual functional capacity ("RFC"),<sup>2</sup> age, education, and  
21                  work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at  
22                  721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may  
23                  do so by the testimony of a vocational expert or by reference to the  
24                  Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart  
25                  P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240

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28                  

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<sup>2</sup> Residual functional capacity is "what [one] can still do despite [his] limitations" and represents an "assessment based upon all of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

1 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional  
2 (strength-related) and nonexertional limitations, the Grids are  
3 inapplicable and the ALJ must take the testimony of a vocational expert.  
4 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

5  
6 **STANDARD OF REVIEW**  
7

8 Under 42 U.S.C. § 405(g), a district court may review the  
9 Commissioner's decision to deny benefits. The court may set aside the  
10 Commissioner's decision when the ALJ's findings are based on legal error  
11 or are not supported by substantial evidence in the record as a whole.  
12 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.  
13 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

14  
15 "Substantial evidence is more than a scintilla, but less than a  
16 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence  
17 which a reasonable person might accept as adequate to support a  
18 conclusion." Id. To determine whether substantial evidence supports  
19 a finding, the court must "'consider the record as a whole, weighing  
20 both evidence that supports and evidence that detracts from the  
21 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny  
22 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can  
23 reasonably support either affirming or reversing that conclusion, the  
24 court may not substitute its judgment for that of the Commissioner.  
25 Reddick, 157 F.3d at 720-21.

1 DISCUSSION  
2

3 A. The ALJ Failed To Properly Assess Plaintiff's Mental Health  
4 Impairment At Step Two of the Evaluation Process

5  
6 Plaintiff contends that the ALJ erred by finding that Plaintiff  
7 does not suffer from a severe mental impairment. (Jt. Stip. at 4). For  
8 the reasons discussed below, the Court finds that the ALJ failed to  
9 properly assess Plaintiff's mental health impairment.

10  
11 By its own terms, the evaluation at step two is a de minimis test  
12 – intended to weed out the most minor of impairments. See Bowen v.  
13 Yuckert, 482 U.S. 137, 153-154, 107 S. Ct. 2287, 2299-2300, 96 L. Ed.  
14 2d 119 (1987)(O'Connor, J. concurring); Edlund v. Massanari, 253 F.3d  
15 1152, 1158 (9th Cir. 2001)(the step-two inquiry is a de minimis  
16 screening device to dispose of groundless claims)(quoting Smolen v.  
17 Chater, 80 F.3d 1273, 1290 (9th Cir. 1996)).

18  
19 The ALJ here applied more than a de minimis test at step two when  
20 he determined that Plaintiff's mental impairment was not severe. He  
21 improperly discounted evidence in the record that would establish a  
22 severe impairment. Finally, he failed to follow the Secretary's own  
23 regulations governing the evaluation of mental impairments, as described  
24 below.

25  
26 Where there is evidence of a mental impairment that allegedly  
27 prevents the plaintiff from working, the Agency has supplemented the  
28 five-step sequential evaluation process with additional regulations.

1       Maier v. Comm'r of the Soc. Sec. Admin., 154 F.3d 913, 914-15 (9th Cir.  
2       1998) (citing 20 C.F.R. § 416.920a) (per curiam). First, the ALJ must  
3       determine the presence or absence of certain medical findings relevant  
4       to the plaintiff's ability to work. 20 C.F.R. § 416.920a(b)(1).  
5       Second, when the plaintiff establishes these medical findings, the ALJ  
6       must rate the degree of functional loss resulting from the impairment  
7       by considering four areas of function: (a) activities of daily living;  
8       (b) social functioning; (c) concentration, persistence, or pace; and (d)  
9       episodes of decompensation. 20 C.F.R. § 416.920a(c)(2-4). Third, after  
10      rating the degree of loss, the ALJ must determine whether the claimant  
11      has a severe mental impairment. 20 C.F.R. § 416.920a(d). Fourth, when  
12      a mental impairment is found to be severe, the ALJ must determine if it  
13      meets or equals a listing in 20 C.F.R. Part 404, Subpart P, Appendix 1.  
14      20 C.F.R. § 416.920a(d)(2). Finally, if a listing is not met, the ALJ  
15      must then assess the plaintiff's RFC, and the ALJ's decision "must  
16      incorporate the pertinent findings and conclusions" regarding the  
17      plaintiff's mental impairment, including "a specific finding as to the  
18      degree of limitation in each of the functional areas described in [§  
19      416.920a(c)(3)]." 20 C.F.R. § 416.920a(d)(3), (e)(2).

20  
21       The regulations describe an impairment as follows:

22  
23       A physical or mental impairment must result from anatomical,  
24       physiological, or psychological abnormalities which can be  
25       shown by medically acceptable clinical and laboratory  
26       diagnostic techniques[ ]. A physical or mental impairment  
27       must be established by medical evidence consisting of signs,  
28

1 symptoms, and laboratory findings, not only by [a  
2 plaintiff's] statements of symptoms.

3  
4 20 C.F.R. § 416.908; see also *Ukolov v. Barnhart*, 420 F.3d 1002, 1005  
5 (9th Cir. 2005) (noting that the existence of a medically determinable  
6 physical or mental impairment may only be established with objective  
7 medical findings) (citing SSR 96-4p, 1996 WL 374187, at \*1-2).

8  
9 In the instant case, Plaintiff filed his application for benefits  
10 on April 7, 2004. On October 5, 2004 and on February 2, 2005, he was  
11 examined at the Mental Health Urgent Care Center at Long Beach. The  
12 report notes that Plaintiff was currently taking Prozac and Seroquel (AR  
13 240), both medications associated with the treatment of mental health  
14 conditions. (AR 227). The clinical assessment concluded that Plaintiff  
15 suffers from a "schizoaffective disorder" and assessed Plaintiff with  
16 a GAF of 35.<sup>3</sup> (AR 234, 236). In another document, labeled "MHUCC  
17 Psychiatrist Intake Assessment," the doctor described Plaintiff as  
18

19  
20 \_\_\_\_\_  
21 <sup>3</sup> A Global Assessment of Functioning score is the clinician's  
22 judgment of the individual's overall level of functioning. It is rated  
23 with respect only to psychological, social, and occupational  
24 functioning, without regard to impairments in functioning due to  
25 physical or environmental limitations. See American Psychiatric  
26 Association, Diagnostic and Statistical Manual of Mental Disorders, 32  
27 (4th ed. 2000) (hereafter, "DSM IV"). A rating of 31-40 on the GAF  
28 scale indicates "[s]ome impairment in reality testing or communication  
(e.g., speech is at times illogical, obscure, or irrelevant) OR major  
impairment in several areas, such as work or school, family relations,  
judgment, thinking, or mood (e.g., depressed man avoids friends,  
neglects family, and is unable to work; child frequently beats up  
younger children, is defiant at home, and is failing at school)." See  
DSM IV, at 34.

1 depressed for ten years. (AR 242). He reported chronic suicidal intent  
2 and that Plaintiff had attempted to kill himself. (AR 243).

3  
4 In the evaluator's notes, he commented that Plaintiff was referred  
5 for an evaluation of depression. (AR 236). Further, he found that  
6 Plaintiff was unable to deny or state that he has present suicidal  
7 intent, but noted that Plaintiff then stated he has had suicidal intent  
8 for years. (Id.). These assessments show the existence of a severe  
9 mental impairment.

10  
11 The ALJ did not properly credit the opinions of these treating  
12 physicians at his step two analysis:

13  
14 On October 5, 2004 and again on February 2, 2005, the  
15 claimant was seen at Telecare Mental Urgent Care (citation  
16 omitted). There were conclusions in those reports indicated  
17 that the claimant has a severe mental impairment. However,  
18 there is no clearly stated basis for such conclusions and the  
19 report is insufficiently detailed to credit. The claimant  
20 has no history of psychiatric treatment or other evidence to  
21 confirm a severe psychiatric impairment. The regulations do  
22 not permit me to make a finding of disability on the basis of  
23 the claimant's allegations of symptoms alone; there must be  
24 medical signs and laboratory findings that show the claimant  
25 has a medial impairment which could reasonably be expected to  
26 produce the symptoms alleged. (citation omitted0. In this  
27 case there are only the claimant's assertions. I cannot find  
28 a severe mental impairment on this basis.

1 The ALJ impermissibly combined the "disability" finding with the "step  
2 two" finding. The "step two" assessment involves a much lower standard  
3 than the actual disability finding.

4

5 Given the conclusions reached when Plaintiff was examined on  
6 October 5, 2004 and on February 2, 2005 and given that a prior doctor  
7 concluded that Plaintiff needed both Prozac and Seroquel, sufficient  
8 evidence existed in the record to conclude that Plaintiff met the de  
9 minimis test posed by step two, i.e., that he suffered from a severe  
10 mental impairment. See 20 C.F.R. § 416.920a(b)(1).

11

12 The Court further agrees with Plaintiff that, if the ALJ felt that  
13 the record was inadequate or "insufficiently detailed," he had a duty  
14 to develop the record, either by seeking more information from  
15 Plaintiff's treating doctors or by requiring Plaintiff to undergo a  
16 consultative psychiatric examination.

17

18 **B. The ALJ Failed To Provide Clear And Convincing  
19 Reasons For Rejecting Plaintiff's Subjective Pain  
20 Testimony**

21

22 Whenever an ALJ's disbelief of a claimant's testimony is a critical  
23 factor in a decision to deny benefits, as it is here, the ALJ must make  
24 explicit credibility findings. Rashad v. Sullivan, 903 F.2d 1229, 1231  
25 (9th Cir. 1990); see Albalos v. Sullivan, 907 F.2d 871, 874 (9th Cir.  
26 1990) (implicit finding that claimant was not credible is insufficient).  
27 Unless there is affirmative evidence showing that the claimant is  
28 malingering, the ALJ's reasons for rejecting the claimant's testimony

1 must be "clear and convincing." Lester, 81 F.3d at 834. As long as  
 2 plaintiff offers evidence of a medical impairment that could reasonably  
 3 be expected to produce pain, the ALJ may not require the degree of pain  
 4 to be corroborated by objective medical evidence. Bunnell v. Sullivan,  
 5 947 F.2d 341, 346-47 (9th Cir. 1991) (en banc); Smolen v. Chater, 80  
 6 F.3d 1273, 1282 (9th Cir. 1996). The ALJ may not discredit a claimant's  
 7 testimony of pain and deny disability benefits solely because the degree  
 8 of pain alleged by the claimant is not supported by objective medical  
 9 evidence. Bunnell, 947 F.2d at 346-47.

10  
 11 The sole reason that the ALJ rejected Plaintiff's testimony is that  
 12 he did not have "thorough diagnostic examinations" and was treated  
 13 "conservatively." The record contradicts this finding. (See AR 113-114  
 14 (describing diagnostic examinations in connection with back pain); AR  
 15 (x-rays); AR 122 (x-rays); AR 163 (Radiology report)). The record  
 16 further reflects that Plaintiff repeatedly sought a variety of treatment  
 17 for his back pain, over several years, and was heavily medicated for his  
 18 back pain, with the side effect of sleepiness.<sup>4</sup>

19  
 20 There may be alternative reasons why the ALJ could reject  
 21 Plaintiff's testimony. However, the reasons given were not clear and  
 22 convincing. Remand is required to remedy this defect.

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23  
 24  
 25       <sup>4</sup> The Court notes that, upon remand, further consideration of  
 26 Plaintiff's mental condition, back pain or other impairments may result  
 27 in a modification of the RFC. Given the evidence of these conditions in  
 28 the record, the Court finds the ALJ's conclusion that Plaintiff can  
 return to his past relevant work as a hospital central service  
 technician is questionable. There may, however, be other jobs that  
 Plaintiff is capable of performing. This issue may be further  
 considered by the ALJ upon remand as well.

1       **C. Remand is Required To Remedy Defects In The ALJ Decision**

2

3              Remand for further proceedings is appropriate where additional  
 4 proceedings could remedy defects in the Commissioner's decision. See  
 5 Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir.), cert. denied, 531 U.S.  
 6 1038, 121 S. Ct. 628, 148 L. Ed. 2d 537 (2000); Kail v. Heckler, 722  
 7 F.2d 1496, 1497 (9th Cir. 1984). Because the ALJ improperly evaluated  
 8 Plaintiff's mental health impairment at step two, the case must be  
 9 remanded to remedy this and other defects.

10

11              Upon remand, the ALJ must conduct the supplemental evaluation of  
 12 mental impairment evidence. Normally, the ALJ must first determine the  
 13 presence or absence of certain medical findings relevant to the  
 14 plaintiff's ability to work. 20 C.F.R. § 416.920a(b)(1). However, this  
 15 Court has determined that there is objective medical evidence that  
 16 Plaintiff suffers from a mental impairment relevant to his ability to  
 17 work. Thus, the ALJ need not address this question. Accordingly, the  
 18 ALJ must only complete the remaining inquiries required in the  
 19 supplemental evaluation of mental impairment evidence.<sup>5</sup>

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21              <sup>5</sup> Specifically, the ALJ must rate the degree of functional loss  
 22 resulting from the impairment by considering four areas of function: (a)  
 23 activities of daily living; (b) social functioning; (c) concentration,  
 24 persistence, or pace; and (d) episodes of decompensation. 20 C.F.R. §  
 25 416.920a(c)(2-4). Next, after rating the degree of loss, the ALJ must  
 26 determine whether the claimant has a severe mental impairment. 20  
 27 C.F.R. § 416.920a(d). If the mental impairment is found to be severe,  
 28 the ALJ must determine if it meets or equals a listing in 20 C.F.R. Part  
 404, Subpart P, Appendix 1. 20 C.F.R. § 416.920a(d)(2). Finally, if a  
 listing is not met, the ALJ must then assess the plaintiff's RFC, and  
 the ALJ's decision "must incorporate the pertinent findings and  
 conclusions" regarding the plaintiff's mental impairment, including "a  
 specific finding as to the degree of limitation in each of the  
 functional areas described in [§ 416.920a(c)(3)]." 20 C.F.R. §

1 Plaintiff's credibility must be reconsidered in the ALJ's  
2 assessment of Plaintiff's RFC. On remand, the parties shall not be  
3 precluded from addressing any issue not resolved by this Court.

4

5 **CONCLUSION**

6

7 Consistent with the foregoing, and pursuant to sentence four of 42  
8 U.S.C. § 405(g),<sup>6</sup> IT IS ORDERED that judgment be entered REVERSING the  
9 decision of the Commissioner and REMANDING this matter for further  
10 proceedings consistent with this decision. IT IS FURTHER ORDERED that  
11 the Clerk of the Court serve copies of this Order and the Judgment on  
12 counsel for both parties.

13

14 DATED: January 14, 2008.

15 /S/

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SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE

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26 416.920a(d)(3), (e)(2).

27       <sup>6</sup> This sentence provides: "The [district] court shall have power  
28 to enter, upon the pleadings and transcript of the record, a judgment  
affirming, modifying, or reversing the decision of the Commissioner of  
Social Security, with or without remanding the cause for a rehearing."